

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION**

BAY, INC. AND)	
DENNIS BERRY)	
PLAINTIFFS)	
)	
V.)	CIVIL ACTION _____
)	JURY TRIAL DEMANDED
OHIO NATIONAL LIFE ASSURANCE)	
CORPORATION AND UNDER)	
ITS COMMON OR ASSUMED NAME)	
DEFENDANT)	

PLAINTIFFS' ORIGINAL COMPLAINT

COMES NOW Plaintiffs, Bay, Inc. (Bay) and Dennis Berry (Berry) by and through their undersigned counsel and for their original complaint against Ohio National Life Assurance Corporation (Ohio) and in its common or assumed name, hereby states and alleges as follows:

I. PARTIES

1. Bay is a Texas corporation with its principle offices located in Corpus Christi, Texas.
2. Berry is an individual who resides in Nueces County, Texas.
3. Upon information and belief, Ohio and under its common or assumed name is an Ohio corporation with its principle place of business located at One Financial Way, Cincinnati, Ohio 45242. The defendant is authorized and registered

to do business in Texas and may be served by serving its registered agent/attorney for service **Corporation Service Company d/b/a Csc-Lawyers, 211 E. 7th St. Suite 620, Austin, Texas 78701-3218.**

II. VENUE AND JURISDICTION

4. This Court has jurisdiction to entertain this action under 28 U.S.C. § 1332 because there is complete diversity of citizenship between the plaintiffs and the defendant and the matter in controversy exceeds the sum of \$75,000.00, exclusive of interest and costs. More specifically, this action involves a life insurance policy, the face value of which is \$2 million.

5. Venue is proper in the United States District Court for the Southern District of Texas, Corpus Christi Division, under 28 U.S.C. § 1391 as the life insurance policy/account at issue in this lawsuit was marketed, sold and serviced in this district; Bay's principal place of business is located within this district; and Berry, who is the named insured under the policy, is an individual who resides within this district.

III. FACTUAL ALLEGATIONS

6. On or about October 28, 1985, Ohio issued a universal life policy under policy number C6065811. Bay is the owner of the policy and Berry is the named insured. Berry is a principle and owner of Bay and its various entities, all of

which are located in Corpus Christi, Texas. Berry was 28 at the time the policy was issued by Ohio.

7. Money was routinely taken out of the equity of the policy to pay the premiums, and, if there was a shortage, Bay paid the difference. If a shortage was due, Ohio would send written letters to Bay informing Bay of what would be required to pay to make up the difference. This went on for over 30 years.

8. On or about July 2017, a payment may have been due by Bay, but Bay does not recall receiving any letter to pay a shortage as had been done in the past. Once the time for payment had expired, Texas law required Ohio to send a notice of payment due for a grace period of 30 days.

9. Ohio sent a grace period notice on August 1, 2017, stating payment was due on September 26, 2017. Ohio sent another grace period notice on August 31, 2017, stating the payment was due by September 26, 2017.

10. On September 22, 2017, Bay sent a check in the full amount to Ohio at its listed post office box in Cincinnati, Ohio. By subsequent letter, Ohio claimed it received the payment on September 27, 2017. Ohio then canceled the policy.

11. Bay attempted to obtain a copy of the insurance contract from Ohio. Bay tendered the \$25.00 copy fee to Ohio. Ohio returned the money and refused to provide Bay a copy of the insurance copy.

12. Plaintiffs contend Ohio received the payment in time. All conditions precedent have occurred. Plaintiffs plead the mail box rule, actual receipt, constructive receipt, waiver and estoppel.

IV. COUNT ONE - REQUEST FOR DECLARATORY RELIEF

13. Pursuant to 28 U.S.C. 2201 *et seq.*, Plaintiffs seek a declaration that their obligations under the written contract were fulfilled, that the policy did not lapse, that the payments were timely, and that the policy is still in full force and effect. In the alternative, Plaintiffs seek a declaration reinstating the policy.

V. COUNT TWO - BREACH OF CONTRACT (Alternative Pleading)

14. Plaintiffs incorporate the allegations in the preceding paragraphs as if copied verbatim herein.

15. Pleading in the alternative, if such be necessary, there was a contract of insurance between Bay and Ohio, with Berry being the named insured. Bay timely made all payments and yet, Ohio wrongfully canceled the contract. In addition, the grace period notice dated August 31, 2017 started a new mandated 30-day grace period and such 30 days was not given by Ohio. Ohio did not comply with Texas law governing grace period for life insurance contracts. If there was a lapse, then Ohio materially breached its agreement to reinstate.

16. As a result of Ohio's material breach of contract, Bay and Berry have suffered damages. However, there is no adequate remedy at law. This insurance

policy has a \$2 million value, and Bay and Berry, thru no fault of their own, have lost that value due to the conduct of Ohio. The triggering event under the policy is the death of Berry. That event has fortunately not occurred, and God-willing, will not occur for many more years. In the meantime, though, the policy has the value of the benefit bargained for, *i.e.* the amount of the life insurance benefits. Thus, damages prior to the death of the named insured would be inadequate compensation. Furthermore, Plaintiffs are ready, willing and able to perform under the policy. In fact, they have, in fact, performed by tendering the premiums due.

17. Bay therefore seeks specific performance of the agreement to reinstate, plus attorney fees in accordance with Texas law.

WHEREFORE, Bay and Berry pray for the following relief:

- A. that the Court enter judgment declaring that their obligations under the life insurance policy were fulfilled, that the policy did not lapse, that the payments were timely, and that the policy is still in full force and effect;
- B. alternatively, that the Court enter a declaration that all payments were timely made and that the policy was reinstated;
- C. alternatively, that the Court enter a judgment in Bay's and Berry's favor and against Ohio for specific performance;
- D. that Bay and Berry be awarded their reasonable attorney fees and costs incurred in prosecuting this case; and

E. for such other and further relief, legal and equitable as this Court seems just and fair.

Respectfully Submitted,

LAW OFFICES OF J. MITCHELL CLARK

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Attorneys for Plaintiffs

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

<input type="checkbox"/> 1 U.S. Government Plaintiff	<input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)
<input type="checkbox"/> 2 U.S. Government Defendant	<input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 375 False Claims Act
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 365 Personal Injury - Product Liability	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 376 Qui Tam (31 USC 3729(a))
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 367 Health Care/ Pharmaceutical Personal Injury Product Liability		<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 330 Federal Employers' Liability		<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 345 Marine Product Liability		<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability		<input type="checkbox"/> 450 Commerce
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans)	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 370 Other Fraud		<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 371 Truth in Lending		<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 380 Other Personal Property Damage		<input type="checkbox"/> 480 Consumer Credit
<input type="checkbox"/> 190 Other Contract		<input type="checkbox"/> 385 Property Damage Product Liability		<input type="checkbox"/> 490 Cable/Sat TV
<input type="checkbox"/> 195 Contract Product Liability				<input type="checkbox"/> 850 Securities/Commodities/ Exchange
<input type="checkbox"/> 196 Franchise				<input type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	SOCIAL SECURITY	<input type="checkbox"/> 891 Agricultural Acts
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 440 Other Civil Rights	Habeas Corpus:	<input type="checkbox"/> 861 HIA (1395ff)	<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 463 Alien Detainee	<input type="checkbox"/> 862 Black Lung (923)	<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 510 Motions to Vacate Sentence	<input type="checkbox"/> 863 DIWC/DIWW (405(g))	<input type="checkbox"/> 896 Arbitration
<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 443 Housing/ Accommodations	<input type="checkbox"/> 530 General	<input type="checkbox"/> 864 SSID Title XVI	<input type="checkbox"/> 899 Administrative Procedure
<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 445 Amer. w/Disabilities - Employment	<input type="checkbox"/> 535 Death Penalty	<input type="checkbox"/> 865 RSI (405(g))	Act/Review or Appeal of Agency Decision
<input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 446 Amer. w/Disabilities - Other	Other:		<input type="checkbox"/> 950 Constitutionality of State Statutes
	<input type="checkbox"/> 448 Education	<input type="checkbox"/> 540 Mandamus & Other		
		<input type="checkbox"/> 550 Civil Rights		
		<input type="checkbox"/> 555 Prison Condition		
		<input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement		
			FEDERAL TAX SUITS	
			<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	
			<input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	
			IMMIGRATION	
			<input type="checkbox"/> 462 Naturalization Application	
			<input type="checkbox"/> 465 Other Immigration Actions	

V. ORIGIN (Place an "X" in One Box Only)

<input type="checkbox"/> 1 Original Proceeding	<input type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from Another District (specify) _____	<input type="checkbox"/> 6 Multidistrict Litigation - Transfer	<input type="checkbox"/> 8 Multidistrict Litigation - Direct File
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Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): _____

VI. CAUSE OF ACTION

Brief description of cause: _____

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION
UNDER RULE 23, F.R.Cv.P.

DEMAND \$ _____

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): _____

JUDGE _____

DOCKET NUMBER _____

DATE _____

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____

APPLYING IFP _____

JUDGE _____

MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.

Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.

PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.